

The April 17, 2008 Final Office Action rejected claim 14 under 35 U.S.C. § 112, second paragraph, and rejected claims 14-16 and 28 under 35 U.S.C. § 103 as being unpatentable of the combined teachings of the Swanson '012 patent **and the newly cited** U.S. Patent No. 5,715,825 to Crowley ("the Crowley '825 patent").

As noted in MPEP § 707.06(a), "second or any subsequent actions on the merits shall be final, except where the examiner introduces a **new ground of rejection** that is neither necessitated by applicant's amendment of the claims, nor based on information submitted in an information disclosure statement filed during the period set forth in 37 CFR 1.97(c) with the fee set forth in 37 CFR 1.17(p)." The rejection under 35 U.S.C. § 112, second paragraph, is a new ground of rejection, and claims 14-16 and 28 were not amended in response to the November 15, 2007 Office Action. As such, the April 17, 2008 Office Action should not have been made final.

MPEP § 707.06(a) also states that "a second or any subsequent action on the merits in any application or patent undergoing reexamination proceedings **will not be made final** if it includes a rejection, on newly cited art, other than information submitted in an information disclosure statement filed under 37 CFR 1.97(c) with the fee set forth in 37 CFR 1.17(p), of any claim not amended by applicant or patent owner in spite of the fact that other claims may have been amended to require newly cited art." The Crowley '825 patent was not cited in an information disclosure statement subsequent to the November 15, 2007 Office Action, and claims 14-16 and 28 were not amended in response to the November 15, 2007 Office Action. As such, and for reasons in addition to those presented in the preceding paragraph, the April 17, 2008 Office Action should not have been made final.

Applicant respectfully submits that the April 17, 2008 Office Action is defective by virtue of the improper finality and hereby requests that a corrected, i.e., non-final, Office Action be issued and that reply period be restarted.

The Commissioner is hereby authorized to charge any fees which may be required, or credit any overpayment to Deposit Account No. 50-0638. Should such fees

be associated with an extension of time, applicant respectfully requests that this paper be considered a petition therefor.

Respectfully submitted,

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Date

/Craig A. Slavin/  
Craig A. Slavin  
Reg. No. 35,362  
Attorney for Applicant

**Henricks, Slavin & Holmes LLP**  
840 Apollo Street, Suite 200  
El Segundo, CA 90245  
(310) 563-1458  
(310) 563-1460 (Facsimile)